IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

RICHARD T. TALBERT, ADMINISTRATOR OF WILLIAM TALBERT, deceased,

v.

THE UNITED STATES.

No. 24.

THE UNITED STATES

v.

RICHARD T. TALBERT, ADMINISTRATOR OF WILLIAM TALBERT, deceased.

No. 25.

APPEAL FROM THE COURT OF CLAIMS.

Brief of S. S. Henkle, Counsel for Talbert's Administrator.

STATEMENT OF THE CASE.

This case comes into this court upon cross-appeals by the claimant and the United States from the judgment of the

Court of Claims for $6,564.30 for the use of Talbert's patented invention for "improvement in marine railways" at the Washington Navy Yard. That court obtained jurisdiction under the following act of Congress:

"AN ACT for the relief of William Talbert.

"*Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That the claim of William Talbert, of Montgomery county, Maryland, for the use by the Government of his patented improvement for marine railways be, and the same is hereby, referred to the Court of Claims, with authority to take jurisdiction thereof, and to award judgment thereon as the *merits of the case may demand, according to its value to the Government during the existence of such patent.*"

Talbert's patent was a device placed upon the marine railway at the Washington Navy Yard for the purpose of hauling up vessels upon the ways for construction or repairs.

In order that the court may understand the device and its use it may be well to describe, first, the railway itself and the cradles (which are old); afterwards, the *patented* device placed thereon.

I quote from Finding 4 of the Court of Claims (p. 14).

THE RAILWAY.

"The railway at the Navy Yard was the ordinary marine railway, consisting of three heavy parallel timbers, leading from the water up the bank, the middle being 28 inches wide, and the outside ones being each 14 inches wide; upon these timbers were iron rails. The track was about 450 feet long; it ran upon a grade of $\frac{3}{8}$ of an inch to the foot sloping downwards towards and into the Eastern Branch of the Potomac River. From high-water mark it extended about 200 feet into and under the water."

The Cradle.

"The cradle was placed upon the track and corresponded with it. It was made of heavy pieces of timber, laid lengthwise upon the rails of the track, and securely fastened into a framework. The whole framework moved upon heavy iron wheels upon the three rails of the track. The wheels on the centre rail were six feet apart, and upon the side rails there was a wheel under each bilge-block. The bilge-blocks were intended to be moved in by sliding against the hull so as to hold the vessel in place and upright after she grounded upon the cradle.

"Before Talbert's device was applied there were fixed upon the centre timber of the cradle heavy stationary blocks 5 feet apart the whole length of the cradle. These blocks were 2 feet high, the keel of the vessel grounded upon them, and their office was to bear the weight of the ship and to give room between the ship's keel and the cradle to allow work to be done on the under side of the vessel.

"In preparing the cradle to receive his improvement Talbert removed the stationary blocks from the centre timber of the cradle for a distance of a hundred feet from the head, or upper end, of the cradle, and placed a cast-iron track upon the centre timber of the cradle, with a rack in the centre to hold a pawl attached to the after end of the forward car.

"The stationary blocks on the after end of the cradle (the end nearest the water) were left as they were originally on the cradle. The tops of the cars were on the same plane as the tops of the remaining blocks. The cars were fastened to one another by chains of convenient length."

Talbert's Invention as taken from his Patent (p. 12, Record).

"The nature of my invention and improvement in marine railways consists in making a railway track on the cradle for about one-half its length at the upper end, and providing one, two, three, or a series of movable blocks or cars to run on said railway track, which movable blocks or cars are

so constructed and connected by chains fastened to each side that they may be placed together on the lower end of the railway track (when the cradle is run down or placed at the foot of the marine railway) where the fore foot of the vessel is placed on the upper movable block or car, which is drawn up, taking the vessel with it onto the cradle, and when the first block has moved a proper distance the chains start the second movable block, and when that has moved a proper distance the chains start the third block, and so on in succession, until all the movable blocks are properly placed and arranged under the keel of the vessel and she has been drawn onto the cradle."

How to use the Device. (See Patent, pp. 13–14, Record).

"To use my improvements in taking a vessel upon a railway, I run all the movable blocks or cars against each other at the lower end of the track F, and then run the cradle down the railway until the standard P on the upper car indicates sufficient water on the upper car to receive the fore foot of the vessel, and then haul the fore foot of the vessel onto the upper car, and apply power to the car and haul it up the track F, drawing the vessel with it, and as the chains which connect the cars are drawn tight or straight the cars move forward in succession and are arranged at proper distances in succession on the track. When the vessel has been hauled her whole length on the cradle, the power is applied to the cradle, and it is drawn up on the railway; and when it is apparent that the keel of the vessel at the stern rests on the cradle, so as to lift her up in the water, the bilge-block should be hauled under to hold the vessel upright on the cradle. When the cars are drawn up on the track F, the pawls on the rear ends of the cars catch in the rack between the track F and hold the cars from running back. When the vessel is ready to be launched, the pawls on the cars must be all triced or tied up, so as to leave the cars free to run to the lower end of the track F as the vessel runs off of the cradle."

The Object of the Device.

The object of Talbert's invention was to overcome the difficulty in getting vessels upon the ways on account of the shallowness of the water on the upper end of the cradle when submerged.

Finding V.

"At the Washington Navy Yard there was but three feet of water upon the upper end of the cradle when immersed, and, prior to the adoption of Talbert's device, vessels drawing more than three feet of water and 200 feet long could not be taken out. Vessels drawing 5 feet of water and 150 feet long might have been taken upon the after end of the cradle, but not sufficiently high up on the cradle for efficient work upon them. By the use of Talbert's improvement vessels drawing 13 feet of water and 250 feet long were taken up so as to be efficiently repaired."

Finding VI.

"The Washington Navy Yard was thoroughly furnished with the best shipwrights' tools and latest and best machinery, and was equipped as a private proprietor would not equip his ship-yard for ordinary business. But for Talbert's improvement, or its equivalent, the use of the yard would have necessarily been limited to the repair of small vessels which could have been taken up on the cradle without that improvement.

"During the war gunboats were repaired at the Washington yard which it would have been difficult to repair at private yards in time to meet the exigencies of the service, and which could not have been repaired at the Washington yard without using Talbert's or a similar device. The ability to repair their vessels at the Washington Navy Yard, especially during the active operations of the war, was of service and value to the Government."

Finding VII.

The Talbert invention was novel and useful, and was the product of original thought and inventive skill.

Talbert never made or attempted to make any other use or profit out of his invention, and it does not appear that the invention has ever been used elsewhere than at the Washington Navy Yard.

Talbert remained in the Government service as ship carpenter until 1882, and received the pay of a ship carpenter.

Assignment of Errors.

1st. The court erred in its construction of the special act of Congress sending the case to the Court of Claims.

2d. The court erred in deciding that it was a case for the allowance of a *royalty* for the use of a patent.

3d. The court erred in the principle adopted for estimating the amount for which the plaintiff was entitled to judgment.

4th. The court grossly erred in the amount found for which it gave judgment.

5th. The measure of damages should have been *the value of the use of Talbert's invention to the Government* during the life of his patent, whereas the court treated it as a *royalty* for the use of a patented machine.

6th. The judgment should have been for $328,215.00 instead of $6,564.30.

7th. And for other errors apparent upon the face of the record.

Argument.

We are met at the threshold with the contention on the part of the Attorney-General that this court has no alter-

native but to affirm the judgment of the Court of Claims.

He argues that the court below having found as a fact in the case that Talbert's patent was "novel and useful and the product of original thought and inventive skill," and also that "the value to the Government of plaintiff's patented improvement during the existence of his patent was $6,564.30," such findings are *conclusive* upon this court.

So, although the United States has appealed as well as Talbert, the Attorney-General seems to be of the opinion that the judgment in *favor of Talbert below should be affirmed.*

If the learned counsel for the Government is right in his view, that is the end of this case.

It is admitted that the finding as to the *originality, novelty,* and *usefulness* of the invention is a *finding of fact,* and as such is *conclusive* upon this court. The evidence upon which that finding is based is not in the record, and the ultimate fact as found by the court is alone returned, so this court could not go behind the finding if it would. But the finding as to the *value of the use of the patent to the Government is quite another thing.*

This is not *a finding of fact,* but—

AN ESTIMATE.

So the Court of Claims considered it.

Says the court (p. 24, Record):

"We do not understand that Congress intended in this act to establish a new rule for *estimating* the remuneration plaintiff should receive, for while the words 'according to its *value* to the Government' taken alone might tend to the belief that some *exceptional advantage to the Government* was to receive *exceptional compensation*, these words are limited by the preceding clause, that we are to award judgment as the merits of the case may demand, which means

that we are to proceed as in other cases to give the plaintiff what he *should recover in a similar action against an individual.*"

The court then goes into a discussion of what is meant by the term *value*, as used in the special act, citing Suffolk County *v.* Hayden (3 Wall. 315). After discussing the authorities and the special act, the court (p. 24, Record) says:

"Much difficulty has been encountered in *estimating the amount of plaintiff's recovery, for, while the invention is useful*, it has not been used elsewhere than at the navy yard, so that we are ignorant what *royalty* would be paid at a *private shipyard.*"

The court then goes on to discuss the difficulties of *estimating* damages in such cases, and in conclusion, on p. 25, says:

"*Estimating upon this theory the value to the Government of plaintiff's invention during the existence of his patent, we find it to have been* $6,564.30, *and award judgment in his favor for that sum.*"

It is thus apparent that the court was not dealing with it as a matter of *fact*, but as a matter of *estimate or judgment.* The court found, as it says, *much difficulty in determining upon a basis upon which to make its estimate* for judgment. For that is what it was, and all that it was.

Not a Finding of Fact, and Not Conclusive.

The 2d rule of this court regulating appeals from the Court of Claims provides that the record shall contain "A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special ver-

dict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court finds its judgment or decree. The findings of facts and conclusions of law to be certified to this court as a part of the record."

As the testimony does not come up, but only the findings of the court of the *ultimate facts*, the findings of facts are and must be *conclusive*, but not so as to the *estimate for judgment*. That is based upon the *ultimate facts* found by the court, and this court has precisely the same facts upon which to *estimate* or base judgment as the court below, and hence that judgment is always subject to review in this court.

The Court Finds Difficulty in Fixing the Rule for Estimating Damages.

The court found that the patent was *original;* that it was *novel*, and that it was *useful*. That it had been successfully and beneficially used by the Government. But they found no precedent for the assessment of damages in such cases, for the good reason that no such case had ever before occurred.

As the case was *novel* they found "much difficulty," as they say, in deciding upon the principle upon which to assess the damages.

The first difficulty they encountered was in determining whether Congress in the special act sending the case to the court did not intend in view of some "*exceptional*" *advantage* to the Government that the claimant should receive "*exceptional compensation*," but in construing the act they came to the conclusion "*that we are to proceed as in other cases to give the plaintiff what he should recover in a similar action against an individual.*" And so they concluded that

they would treat the case as though it were a suit for a "*royalty*" for the infringement of a patent, and that there was nothing *exceptional* about the *compensation*, although the *advantages* to the Government might have been *exceptional.*

Difficult to Determine Amount of Royalty.

Again, having *determined* that it was a case for *royalty*, the court found difficulty in determining upon the amount of the *royalty*. They say (p. 24): "Much difficulty has been encountered in *estimating the amount of the plaintiff's recovery, for, while the invention is useful*, it has not been used elsewhere than at the Navy Yard, so that we are *ignorant what royalty would be paid at a private ship-yard.*"

These are Questions of Law.

Certainly the construction of the special act of Congress conferring jurisdiction upon the court, and the principle determining the assessment of damages, are not *matters of fact*, but *questions of law* for *judicial judgment*, and are reviewable in this court.

I now invite the attention of the court to the *finding* which the learned counsel for the Government claims to be *conclusive* upon this court as a *finding of fact* (Record, p. 16).

Finding of Damages.

VIII.

"The value to the Government of plaintiff's patented improvement for marine railways during the existence of his patent was $6,564.30, *being 2 per cent. upon the amount*

earned by the railway cradle as improved during said period."

$6,564.30 *is two per cent. upon* $328,215.00. The court must therefore necessarily have found $328,215.00 *to have been the earnings of the cradle during the life of the patent;* and that was, in fact, what the evidence showed.

NOT A FINDING OF FACT.

This is not in any sense a *finding of fact, but the judicial determination upon the facts found* of the amount for which the plaintiff was entitled to judgment, and it is of course reviewable in this court.

IF A FINDING OF FACT, IT IS NEVERTHELESS REVIEWABLE.

A finding of fact by the Court of Claims is by the rule of this court "in the nature of a *special verdict.*"

Where in assessing damages the rule or principle upon which the jury proceeded in determining the amount appears upon the face of the special verdict, if the court is satisfied that the jury adopted a wrong principle, or if the jury has disregarded the rule laid down in the instructions of the court, the court will of course set the verdict aside.

Or if judgment be entered upon the verdict in the trial court, the losing party may have the special verdict reviewed in the appellate court.

No authorities need be cited in this court in support of this proposition. It is familiar, every-day practice.

The finding or special verdict in this case shows upon the face of it the rule or principle adopted in assessing the damages.

Suppose it had been the special verdict of a jury in some other court, and the case was here upon error—the error assigned being that the jury had adopted a wrong principle

in assessing damages, could there be a doubt but that that question was reviewable here?

The fact that the *court* made the finding instead of the *jury* does not at all affect the result.

So, with confidence only qualified by my respect for the opinion of the counsel for the Government, I submit that the case is properly here for trial and judgment upon the *merits.*

Did the Court Err in the Assessment of Damages?

The court found that the earnings of the cradle with Talbert's improvement upon it were $328,215, and of this large sum they gave Talbert 2 *per cent.*, *or* $6,564.30.

No reason is assigned either in the finding or in the opinion of the court for this *startling conclusion.*

If the *earnings of the cradle* were to be taken as the basis for assessing damages, how or why 2 *per cent.* should be awarded the claimant the court has left us to *guess*, for it has nowhere given the slightest hint, and in view of the other findings of the court it would seem to be *incredible.*

Earnings of the Cradle.

Nothing is clearer or better established by the facts found by the court than that the *earnings* of the cradle were *almost if not wholly due to Talbert's improvement.*

That without this the vessels that were repaired there, especially during the war, *could not have been repaired there at all.*

Only the smallest class of vessels, and these such as were of little or no use in time of war, could have been taken up without Talbert's improvement, and none such were taken into the account of the earnings of the cradle.

There is no finding as to what the cradle might have earned *without the improvement*, but the *facts found* show that the large sum of $328,215 was earned *by the cradle*, and this was in handling the gunboats and large war vessels, which could not have been taken up *without it*.

Says the court in finding VI, on p. 15:

"But for Talbert's improvement or its equivalent, *the use of the navy yard would necessarily have been limited to repairs of small vessels which could have been taken up on the cradle without the use of that improvement.*"

And again in same finding:

"During the war gunboats were repaired at the Washington Navy Yard *which it would have been difficult to repair at private yards in time to meet the exigencies of the service, and which could not have been repaired at the Washington Navy Yard without the use of Talbert's or a similar device.* The ability to repair their vessels at the Washington Navy Yard, especially during the active operations of the war, was of service and value to the Government."

If the "*value*" of *Talbert's invention to the Government* during the life of his patent was to be determined by the *earnings* of the *cradle*, instead of *two per cent.*, Talbert should have been allowed *ninety-eight* per cent.

There is no theory consistent with law or equity upon which the *estimate of value* and the *judgment* of the Court of Claims can be *justified* or *reconciled with the facts found.*

The Navy Yard was Useless Before Talbert's Improvement was Put On.

The Washington Navy Yard, with all its splendid equipments of machinery, tools, skilled workmen, and facilities of every kind for doing the work of repairing the Govern-

ment vessels, when the war came on, and the Confederates had taken and held the Norfolk Navy Yard, where the larger vessels had theretofore been repaired, Admiral Smith, Chief of the Bureau of Yards and Docks, found that this yard was of little or no service for the repair of the Government war vessels because of the shallowness of water in the Eastern Branch of the Potomac. With the cradle then in use the war vessels could not be taken out of the water for repairs. There was no dry-dock and one could not be made there.

Gunboats Waiting to be Repaired, Admiral Smith Hurried the Putting on of the Improvement.

In the second year of the war several war vessels were awaiting repairs to return to their stations in the blockading service.

It was almost if not quite impossible to have the necessary repairs done at the Northern private yards in time to meet the exigencies of the service, to say nothing of the largely increased cost.

Admiral Smith had just tried the device of one Bishop which was intended to remedy the deficiency on account of the shallowness of water at the Navy Yard. Upon the first attempt to take up a vessel with it the device was crushed and destroyed.

In this emergency Talbert showed to the commandant of the yard and Admiral Smith a drawing of the device which he had conceived but not yet patented.

The clear-headed admiral immediately saw that the device was the thing he wanted, and directed Talbert to at once put it upon the cradle. Talbert asked that his device be not used until he got his patent. The admiral replied "*that imminent national necessity required immediate use*

of the device, and told Talbert to place it immediately upon the cradle," which he did.

It Fully Answered the Requirements.

From that time to the close of the war, and ever since, so long as the Navy Yard was used for repairing vessels, this device fully met all the demands of the Government service. All the gunboats and other war vessels needing repairs were easily taken up and were promptly repaired and sent back upon their stations. *Without Talbert's device all this would have been impossible. So the Court of Claims finds.*

Only Worth $6,564.30.

One would naturally think that a device which accomplished all this "*was worth to the Government*" *more than* $6,564.30, *and that the full earnings of the cradle of* $328,215.00 *would not have been an overestimate of value.*

Other Savings and Benefits to the Government not Considered in the Earnings of the Cradle.

There is no way of estimating how much *in money was saved to the Government* by repairing its vessels at its own yard, with its own machinery, tools, workmen, and materials. It certainly was *many, many* times the *pitiful sum* allowed Talbert by the Court of Claims.

Then the advantage of having the work done under the direction of the Navy Bureau, and the time gained, &c., was of much value.

All these things were fairly to be considered in estimating the value of the use of Talbert's invention to the Government.

But the *Court of Claims appraised it all at* $6,564.30, *which would not reimburse Talbert the money spent in trying to get justice.*

TALBERT'S CONTRACT.

On p. 11, Record, in the first finding of fact, the court found:

"The device was put upon the railway by Talbert under the direction of Rear-Admiral Smith, the chief of the Bureau of Yards and Docks, with the *understanding and agreement between him and Talbert* that the latter should be allowed as compensation (if the invention should prove to answer the purpose for which it was intended) '*outside prices*' *for the work done by it. If the device failed, Talbert was to pay for the trial.*"

This was the *express contract upon which Talbert put his device upon the cradle.* He was not to take whatever the Government might choose to give him, but he was to be paid the same prices that prevailed at private shipyards for the work done by his device.

Talbert was a plain mechanic, and always supposed his contract was binding upon the Government, and relied upon it, and as between man and man *he could have enforced it.*

The findings of the Court of Claims fully establish that the *contract was more than complied with on Talbert's part.*

Although the *contract* may not have been binding upon the Government while it was *executory*, yet, having been fully performed on Talbert's part, and the Government having had *the full benefit of it,*

Talbert should have been allowed his contract price for the work done by his device.

A fair interpretation of the special act conferring jurisdiction *required judgment upon this basis.*

To award Talbert *two hundredths parts* of what by his contract he was entitled to the *whole was a cruel mockery of justice.*

The Court of Claims did fairly by Talbert in the *findings of facts*, but it *wholly misconceived the spirit of the act of Congress* in conferring jurisdiction in its estimate of the *value of Talbert's patent to the Government*, and in the judgment rendered.

The direction of the act was "to *award judgment as the merits may demand, according to its value to the Government during the existence of such patent.*"

The *value* of the *use of the patent to the Government during its existence*, or, in other words, *what was it worth to the Government?—this was to be the measure of the judgment.*

How Was That to be Determined?

One way was that adopted by the Court of Claims, to take the *earnings of the cradle*, as that was easily ascertainable from the evidence furnished from the Navy Department. But this when footed up made the large sum of $328,215.00. The court was appalled at this, and so it concluded to give him *two per cent.* of this sum. That Talbert's invention had enabled the cradle to earn this large sum the *ingenuous* findings of the court establish beyond question. That *without this improvement* the cradle could have earned *little* or *nothing* is just as clearly established by the findings of the court.

That Talbert's invention saved the Government hundreds of thousands of dollars *in money* is clearly established by the findings of facts.

That the Government could much better have afforded to pay Talbert the amount claimed in his petition ($500,000)

than to have been without it is clearly established by the findings of the court.

TALBERT SHOULD HAVE BEEN ALLOWED HIS CONTRACT PRICE FOR THE WORK DONE BY HIS DEVICE.

In the opinion of the court, on p. 23, Record, it is said:

"It is true that the plaintiff consented to the application of his device to the cradle at the navy yard, but that consent was coupled with a condition, to wit, *that he should be paid for its use.* Admiral Smith had not the power to commit the Government to a contract for *royalty, but an implied contract arose*, as we have seen, from the user, and having taken advantage of the act of their agent, Admiral Smith, the chief of the Bureau of Yards and Docks, in applying the device, *they must be held to the condition agreed upon by him and Talbert that the patentee should be compensated. Plaintiff did not consent to the gratuitous use of his patent; quite the contrary, he consented to its use upon the promise of compensation.*"

It will be remembered that in the first finding, on page 11 of the Record, the court found that Talbert's device had been put upon the cradle under an express contract between Talbert and Admiral Smith, chief of the Bureau of Yards and Docks, by which Talbert, in case the device answered the purpose, should receive as *compensation for the use* of his device "*outside prices*" for its earnings.

The court holds that Admiral Smith had no power to make a contract binding upon the Government for the payment of "*royalty*" for the use of Talbert's device, yet, having taken advantage of the use of the device, it is bound upon an *implied contract to pay for the use.*

It was not a *royalty* that Talbert and Admiral Smith stipulated for. It was that Talbert should *have the same price paid at private yards for the earnings of his device.*

Now, although the contract may not have been binding on the Government as an executory contract *after performance*, the law implies promise to pay what the service *was worth*. Said this court in *Clark* v. *United States*, 95 *U. S., at* 542:

"We do not mean to say that where *a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or service. On the contrary, we think that he will be entitled to recover such value as upon an implied contract upon a quantum meruit.*"

On p. 543: "Of couse the claimant is entitled to the use of his vessel during the time it was in the hands of the Government agents, which, as shown by the findings, was the period of eight days. *This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract.*"

The court held that the act of Congress of June 2, 1862, requiring all contracts made with the Secretaries of War, Navy, and Interior, or by officers under them, to be reduced to writing, &c., was mandatory, and that therefore *parol* contracts made by them were *unlawful*.

The oral agreement between a quartermaster and the owner of the vessel was that the Government should pay for the use of the vessel $150 per day; that she should make a trial trip at the expense of the Government, and if lost during this trip the Government should pay for her, &c.

The vessel was lost upon the trial trip, but was used eight days. The owner brought suit in the Court of Claims for the value of the vessel and for the eight days' service.

As negligence was not imputed to the employés of the Government, this court held that the claimant could not re-

The Court Misconceived the Act of Congress.

The court totally misconceived the purpose of Congress in passing the act, and the scope and requirement of the act itself, which was to give Talbert judgment for the *value of the use of the invention to the Government during the life of the patent.*

In meeting this requirement the court *endeavors to find some precedent for royalties allowed patentees from infringers*, and failing to find any such it concludes to give him *two per cent. upon the earnings of the invention where he had bargained with the agent of the Government for the whole.*

The question that the court should have dealt with was, *how much all these benefits which the court found the Government had derived from the use of this device were worth to the Government?*

Congress never contemplated *dwarfing the claim of Talbert to a question of royalty* for the use of a patented machine. Congress *recognized* that a *great and valuable service had been rendered the Government when it was in dire need of it*, and it sent the claim to the Court of Claims, where testimony might be taken and a judicial ascertainment might be had of the *value of the service*, and in doing so Congress took care to fix the *measure of the recovery* by providing that the court should render *judgment for the value of the service to the Government during the life of the patent*, and there was to be no question about a petty *royalty* upon a machine.

This *measure of damages* the Court of Claims makes *no pretence of following, but entirely ignored it.*

To Proceed as Though the Suit was Against an Individual.

On p. 24, Record, the Court of Claims, in discussing the interpretation of the special act conferring jurisdiction upon it, says: "Which means that we are to proceed as in other cases to give the plaintiff *what he should recover in a similar action against an individual.*"

Now, if this was an action against an individual, instead of the Government, there is no question but that the plaintiff would be entitled to recover the *earnings of his device as agreed upon between him and Admiral Smith* before it was put upon the cradle. (See finding I, p. 11.) The Court of Claims finds that this was the contract, but that it was not binding upon the Government because not in writing as required by the act of June 2, 1862, and hence, although the contract was fully executed by Talbert, and the Government received and accepted the benefits of it during the full life of the patent without any intimation from any quarter that he was not to be paid according to the contract, the court now says that he shall receive but *two per cent.* of the amount bargained for.

How the Law would Treat it if it were an Action against an Individual.

Mundorff v. *Wickersham* (63 Pa. St. 87). At p.— says the court:

"Where an agent obtains possession of property under an unauthorized condition, the principal must either return the property or hold it subject to the condition."

P.—:

"Where one adopts a contract entered into without his authority, he must adopt it altogether. He cannot ratify the beneficial part and reject the remainder."

After citing many cases, Judge Sharswood says:

"Many of these cases are put upon an implied authority, but the more reasonable ground, as it seems to me, is that the party having enjoyed a benefit must take it *cum onere*."

Eadie Guilford & Co. v. *Ashbaugh* (44 *Pa.* 519). Says the court at pp. 520, 521:

"If the principal accept, receive, and hold the proceeds or beneficial results of a contract, he will be estopped from denying an original authority or ratification, and if he does not disavow the acts of his agent as soon as he can after they have come to his knowledge, he makes these acts his own. An adoption of the agency in part adopts it in whole, because a principal is not permitted to accept and confirm so much of a contract as he shall think beneficial to himself and reject the remainder." Citing 1 Parsons on Conts. 50–51.

"Where one assumes without authority to act for another, if that other wishes to avail himself of the acts of the agent he must adopt the whole or none." Citing Davenport Savings Fund Association *v.* N. A. Fire Ins. Co. 16 Pa. 74–79.

"Where one person assumes to act as the agent of another without authority, the person for whom he assumes to act cannot claim the benefit of his agency in part only and reject it as to the residue of the transaction." Citing *Broderick* v. *Smith*, 10, ~~page~~ 127. Paige

"The plaintiffs in this case are seeking to avail themselves of the benefit accruing to them under the sale by Allen and at the same time avoid the burdens of the contract. This they cannot be permitted to do. If the rule contended for by the plaintiffs prevail, it would result in the grossest injustice and fraud, and upon neither principle nor authority can such a rule be justified."

Hitchcock *v.* Galveston, 96 *U. S.* 341.

Hitchcock had contracted with the city for constructing side-walks, to be paid for in city bonds. By the city

charter it was provided that the city should not have power to contract an indebtedness exceeding $50,000. It was claimed that this contract being in excess of the limitation was *ultra vires* and void, and so the circuit held. In reversing the judgment of that court said Mr. Justice Strong (p. 350):

"It matters not that the promise to pay was in a manner not authorized by law. If payment cannot be made in bonds because their issue is *ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all.* Such is not the law. The contract is in force so far as it is lawful." P. 351: "The promise to give bonds to the plaintiff in payment for what they undertook to do was therefore at farthest only *ultra vires;* and in such case, though specific of an engagement to do a thing transgressive of its corporate powers may not be enforced, the corporation can be held liable in its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return in the mode in which it promised to perform. This was directly ruled in The State Board of Agriculture *v.* The Citizens' Street Railway Co. (47 Ind. 407). There it was held that 'although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract.' (See also, substantially to the same effect, Allegheny City *v.* McClenkie, 14 Pa. St. 81, and more or less in point, Maher *v.* Chicago, 38 Ill. 266; Oneida Bank *v.* Ontario Bank, 21 N. Y. 490; Argenti *v.* City of San Francisco, 16 Cal. 256; Silver Lake Bank *v.* North, 4 Johns. (N. Y.) Chy. 370)."

The cases might be indefinitely multiplied, maintaining the same doctrine.

Upon the doctrine of these cases, if Talbert had dealt with

Admiral Smith as the agent of an individual or a corporation, he would have been entitled to recover his contract price for the use of his invention, provided the contract had not been positively forbidden by law or been against public policy.

Summing up in Conclusion.

The Court of Claims found that in 1862 "the Washington Navy Yard was thoroughly furnished with the best shipwright's tools and the latest and best machinery, and was equipped as a private proprietor would not equip his shipyard for ordinary business. *But for Talbert's improvement or its equivalent the use of the yard would necessarily have been limited to the repair of the small vessels which could have been taken up on the cradle without that improvement.*"

The vessels that could have been taken up were of *no service in time of war*, so that for the purpose of repairing war vessels the Washington Navy Yard was *practically useless to the Government.*

Talbert's invention enabled the Government to repair its gunboats and other war vessels at the Washington Navy Yard.

The savings in one way and another probably amounted to millions of dollars.

It would have been difficult, if not impossible, to have had the gunboats and other vessels repaired at the Northern private yards in time to meet the exigencies of the service.

The Court of Claims finds that all this was done by the aid of Talbert's invention, and that without it or something equivalent it would have been impossible.

These are the *ultimate facts found by the court*, and are conclusive as facts upon that court and upon this court.

Congress directed the Court of Claims to ascertain what

this was all *worth to the Government*, and give Talbert *judgment for the amount.*

And the court, after finding all these facts (and they could not have done otherwise without utterly disregarding the testimony), gave him judgment for $6,564.30—a sum which would not be more than reasonable counsel fees in the case, and less than the amount expended by Talbert in the endeavor to get his rights.

Such a judgment would seem to be *incredible* in the light of the *findings* of the same court.

The court found the earnings of the *cradle* with Talbert's improvement upon it were $328,215.00; without the improvement the earnings would have been *nothing or next to nothing.*

These earnings of the cradle were but a small part of the benefits derived by the Government from the *use* of Talbert's invention to the Government, as I have already shown.

By Talbert's contract with Admiral Smith he would have been entitled to the earnings of his device, which were $328,215.00.

This, I respectfully submit, Talbert's estate ought to have judgment for.

S. S. HENKLE,
Counsel for Talbert's Admr.